

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

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Opinion No. 04-112

Interstate Movement of Captive Wildlife Through Tennessee Airports

QUESTIONS

1. Are importation permits required in Tennessee for Class I and II wildlife when they are imported by air to a Tennessee airport and then transported out of Tennessee by land carrier to their prospective owner in another state?
2. Are importation permits required in Tennessee for Class I and II wildlife when they are imported by land carrier to an airport in Tennessee and then flown out of Tennessee to their prospective owner in another state?
3. Do Tennessee's regulations governing mobile facilities for Class I wildlife apply to such wildlife when they are being transported by land carrier from another state either to or from a Tennessee airport for purposes of export to a buyer in a third state?
4. If a nonresident has his captive wildlife permit privileges revoked in his home state, can the Tennessee Wildlife Resources Agency issue the nonresident importation and propagation permits to receive and export captive wildlife solely through one of Tennessee's airport facilities?

OPINIONS

1. No. It is the opinion of this Office that the legislature did not intend the import permit provisions in Tenn. Code Ann. § 70-4-411 to apply to Class I and Class II wildlife entering Tennessee only temporarily to change carriers for transport to their final destination in another state and not for the purpose of permanent possession and propagation in Tennessee.
2. The response to this question is identical to that provided in question 1.
3. Yes. The wildlife agency can apply the statutes regarding mobile facilities for transporting Class I wildlife to such animals when they are transported by land into or out of Tennessee airports from another state, because these are reasonable nondiscriminatory regulations that advance legitimate local concerns about public health and safety.

4. It is the opinion of this Office that the legislature did not intend for the statutes governing importation and propagation permits to apply to nonresidents seeking to import and export captive wildlife solely through Tennessee's airport facilities.

ANALYSIS

1. & 2. Necessity of Importation Permits for Captive Wildlife Entering Tennessee

A resolution of the first two questions presented in your request requires an examination of the purpose and intent of the permitting provisions under the captive wildlife statutes, codified at Tenn. Code Ann. §§ 70-4-401 through 70-4-417. These provisions are designed to regulate the possession and propagation of live wildlife in this state and are part of the comprehensive statutory scheme governing wildlife in Tennessee. Tenn. Code Ann. §§ 70-1-101 - 70-8-112.

We understand that in each of the factual scenarios posited by your questions, both the seller and the purchaser of the captive wildlife reside outside of Tennessee in different states, but, in order to consummate delivery, the buyer and seller have agreed to transport the animal by air and land through the State of Tennessee. Under none of the circumstances would the wildlife be transported continuously on one carrier through this state. Rather, in each case, the animal would be shipped into Tennessee by land or air, then transferred at some point in time at an airport inside this state to another carrier for export out of Tennessee to its ultimate destination.

For purposes of questions 1 and 2, the subject animal is designated as belonging to either Class I or Class II. Tenn. Code Ann. § 70-4-403 separates wildlife into five distinct classes for purposes of their possession and propagation in Tennessee. Class I consists of wildlife, both native and non-native to Tennessee, that are determined to be "inherently dangerous to humans" and, therefore, can only be possessed in Tennessee by zoos, circuses or commercial propagators. Tenn. Code Ann. § 70-4-403(1). Class II includes all "native" species, except those listed in another class. Tenn. Code Ann. § 70-4-403(2). The classification of the wildlife is also significant for determining what types of caging and permits, if any, are required in Tennessee.

Class I and II wildlife are generally subject to the import permit requirements in Tenn. Code Ann. § 70-4-411, which provides in pertinent part:

- (a) All persons wishing to possess Classes I and II live wildlife obtained outside the state of Tennessee shall have in their possession the importation permit required by this part. The permit and all bills of lading and shipping papers relating to any wildlife which such person may have in such person's possession shall be open and

available for inspection at all reasonable times by authorized agency officers and employees for the purpose of ensuring compliance with the provisions of this part.

...

(c) An importation permit is required for all interstate movement of live wildlife except Class III, except no permit is required for zoos and temporary exhibitors.

Recognizing that the language in Tenn. Code Ann. § 70-4-411(c) suggests a very broad application and that the captive wildlife at issue in questions 1 and 2 constitute articles in commerce, we must analyze this permitting requirement under the Commerce Clause, which limits the power of states to discriminate against interstate commerce. U.S. Const., Art. I, § 8. The courts have generally held that states have authority to regulate matters of legitimate local concern, even though interstate commerce may be affected, but in doing so states must not place themselves in a position of economic isolation. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980).

Although the wildlife in question here are coming within our borders temporarily, their flow in interstate commerce does not cease until they reach their final destination in another state. If the wildlife agency were to impose an import permit requirement on such captive wildlife, it would be a direct regulation of the flow of interstate commerce in which the commodity would not be coming to rest in Tennessee. Under such circumstances, we do not believe that legitimate local interests would be implicated sufficiently to justify such a permit under Tenn. Code Ann. § 70-4-411(c).

In construing statutes, it is our duty to adopt a construction that will sustain a statute and avoid constitutional conflict if its recitation permits such a construction. *State v. Burkhart*, 58 S.W.3d 694, 697-698 (Tenn. 2001). It is the opinion of this Office that the import permit provisions in Tenn. Code Ann. § 70-4-411 do not apply to the facts delineated under questions 1 and 2, despite the broad language contained in subsection (c). We reach this conclusion primarily because the captive wildlife are not actually being imported into Tennessee for the purpose of possession and/or propagation in this state. Rather, they remain inside our borders only to change carriers. We note that virtually all of the captive wildlife provisions in Tenn. Code Ann. §§ 70-4-401 through 70-4-417 assume that permanent possession and propagation of live wildlife is actually taking place in Tennessee. Therefore, concerns for assuring the health, safety and welfare of the animals and the public come into play in regulating such activities. And that is why the statute governing propagation permits for captive wildlife regulates “[a]ny nonresident who enters the state for the purpose of selling Class I or Class II wildlife *in this state*” Tenn. Code Ann. § 70-4-410(b) (emphasis supplied).

We believe the permit requirement in Tenn. Code Ann. § 70-4-411 is designed to allow the

Tennessee Wildlife Resources Agency (TWRA) to monitor and inspect for disease the Class I and Class II wildlife coming into Tennessee for permanent residence. Such wildlife could theoretically infect other captive wildlife to which they are exposed, or, if they escaped, they could infect the native wildlife populations in Tennessee. This rationale follows from the directive in Article XI, § 13 of the Tennessee Constitution, which empowers the legislature to enact laws “for the protection and preservation of Game and Fish, within the State,”

But under the facts presented in questions 1 and 2, the possibility that the captive wildlife would even have an opportunity to commingle with other wildlife or be exposed to the general public in this state is very slight. It seems unlikely that the State’s interest or concern in regulating their brief entry into Tennessee would be advanced by the imposition of an import permit requirement, and we do not believe the legislature intended such an application under the facts provided. Therefore, we construe the import permit requirement in Tenn. Code Ann. § 70-4-411 to be limited to instances in which captive wildlife are actually being imported into Tennessee for the purpose of possession and/or propagation in this state.

3. Mobile Facilities for Captive Wildlife Entering or Leaving Tennessee

You have also inquired whether Tennessee can impose specific caging requirements on Class I wildlife when they are being transported from another state either to or from a Tennessee airport for purposes of export to a buyer in a third state. Tennessee’s captive wildlife statutes contain extensive requirements for the housing and transportation of wildlife, in particular Class I animals. Tenn. Code Ann. § 70-4-405(h) provides in pertinent part:

(h) Mobile facilities. No mobile facility shall be used in transporting wildlife except as follows:

...

(6) Facilities used in transporting or temporarily exhibiting Class I wildlife shall be constructed of steel or case hardened aluminum of sufficient strength to prevent the escape of wildlife being transported. Such facilities shall be constructed in such a manner to prevent contact between the animal(s) and the general public. All doors shall be locked when the facility is in use.

We believe the legislature intended that TWRA have the authority to apply this provision to the facts presented in question 3, insofar as any such wildlife is transported by land carrier across Tennessee highways, for the following reasons. Unlike the import permit provisions in Tenn. Code Ann. § 70-4-411, these caging requirements seem calculated to advance legitimate local concerns

about public health and safety under the scenario provided. And we are unaware of any comparable federal regulations governing interstate transportation of Class I animals that might preempt these requirements.

Since these caging regulations impact articles that are in the flow of interstate commerce, we have analyzed them under the Commerce Clause, as well. Although states retain authority under their general police powers to regulate matters of legitimate local concern, the dormant or “negative” aspect of the Commerce Clause prohibits state regulatory measures that are designed solely to benefit in-state economic interests by burdening out-of-state competitors. *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 800 (1992). But when a state regulation operates evenhandedly, burdening in-state as well as out-of-state interests, and affects interstate commerce only indirectly, it must be upheld unless the burden imposed on such commerce is clearly excessive in relation to the state’s legitimate local purpose. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 847 (1970).

Here, Tennessee’s statutory provisions regarding mobile facilities for transporting Class I wildlife do not discriminate against interstate commerce, but operate evenhandedly, because they subject wildlife entering Tennessee for the first time to reasonable caging requirements that are identical to the housing and transportation requirements imposed on in-state sources. Furthermore, Tennessee does not stand to gain economically from the regulation, which does not appear to be excessive in relation to the concerns the State seeks to address. Therefore, it is the opinion of this Office that the wildlife agency has the authority to impose such requirements on Class I wildlife entering Tennessee under the circumstances described in question 3.

4. Nonresident’s Entitlement to Captive Wildlife Privileges in Tennessee

Lastly, you have inquired whether TWRA is authorized to issue importation and propagation permits to a nonresident whose captive wildlife privileges have been revoked in his home state, so that the nonresident can import and export captive wildlife solely through one of Tennessee’s airport facilities. As with the facts presented in questions 1 and 2, we are not persuaded that the legislature intended the permit provisions under Tenn. Code Ann. §§ 70-4-410 and 70-4-411 to apply to such factual circumstances.

First, we understand from additional information provided by the agency that the nonresident in question maintains no domicile in Tennessee but desires to list a Tennessee airport as the “facility [propagating] location” for purposes of obtaining a propagation permit. Tenn. Code Ann. § 70-4-410 expressly provides in pertinent part:

- (a) Before any person may engage in the business of propagating or otherwise obtaining Class I or Class II wildlife for sale, barter

or trade, whether indigenous to this state or not, such person must obtain and possess a permit for each propagating location.

(b) Any nonresident who enters the state *for the purpose of selling Class I or Class II wildlife species in this state* shall also be required to purchase and possess a permit.

(Emphasis supplied.)

We do not believe an airport can constitute a facility or propagating location, primarily because this requirement would appear to be more applicable to persons actually maintaining a residence or business in Tennessee. The word “propagate” is generally defined as “to cause to continue or increase by sexual or asexual reproduction; to cause to spread out and affect a greater number or greater area.” *Webster’s Dictionary* 942 (9th ed. 1983). A nonresident, on the other hand, must satisfy the provisions of subsection (b) above and obtain a propagation permit if he or she wishes to enter the state in order to *sell* Class I or Class II wildlife in Tennessee. According to the facts provided under question 4, the sale of the animal has presumably already been consummated, either through the wires or by mail, before the animal arrives in Tennessee. It seems more likely that the airport is actually being used as a delivery or transfer location, rather than a sale location.

Similarly, with respect to an importation permit, the nonresident in this scenario is not importing the wildlife for the purpose of his own possession or propagation of the animal in Tennessee. As we discussed in questions 1 and 2 above, it is the opinion of this Office that the legislature did not intend the import permit provisions in Tenn. Code Ann. § 70-4-411 to apply to Class I and Class II wildlife entering Tennessee only temporarily to change carriers for transport to their final destination in another state.

Finally, we would add that, in the event a nonresident whose captive wildlife privileges have been revoked in his home state establishes a domicile or business address in Tennessee, the wildlife agency has the authority to establish an internal policy that addresses the review of an applicant’s captive wildlife permit history in other states. In this way, the agency can require such information on permit applications and use its discretion in issuing possession, importation or propagation permits based on that information.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ELIZABETH P. McCARTER
Senior Counsel

Requested by:

Gary Myers
Executive Director
Tennessee Wildlife Resources Agency
Ellington Agricultural Center
P. O. Box 40747
Nashville, TN 37204